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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~693~~. 252.

THE STATE OF MONTANA *EX REL.* CHARLES S. HAIRE, PLAINTIFF IN ERROR,

vs.

JAMES H. RICE, AS STATE TREASURER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED APRIL 16, 1906.

(20,195.)

(20,195.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1906.

1 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

Petition.

Your petitioner, Charles S. Haire, respectfully represents and shows unto this Honorable Court:

I.

That respondent is and has been since the first Monday in January, 1905, the duly elected, qualified and acting treasurer of the State of Montana.

II.

That the state board of land commissioners of the State of Montana, pursuant to the authority conferred by and the directions contained in an act of the legislative assembly of Montana entitled "An Act to enable the Normal School land grant to be further utilized in providing additional buildings and equipment for the Montana State Normal College," approved February 2, 1905, issued coupon bonds to the amount of seventy-five thousand dollars, dated May 1, 1905, of the denomination of one thousand dollars each, maturing twenty years from date, payable at the option of the State ten years from date, bearing interest at the rate of four per cent. per annum, payable semi-annually on the first days of May and November
2 in each year at the office of the respondent herein, signed by the state board of land commissioners and countersigned by the secretary of state, with his seal attached thereto. Each of said bonds is payable to bearer and contains the condition required by Section 2 of said act approved February 2, 1905. A copy of one of said bonds is hereto attached, marked "Exhibit A," and made a part hereof.

III.

That said bonds, and all thereof, were duly and regularly offered for sale, and the state board of land commissioners submitted a bid for said bonds, at par, as an investment for the permanent common school fund, which bid was accepted, and said bonds were thereupon delivered to, and are now in, the possession of, and held by, said respondent, pursuant to such sale.

IV.

That at the time of said sale there was, ever since has been and is now to the credit of the permanent school fund, for investment purposes, an amount of money largely in excess of the purchase price of said bonds.

V.

That your petitioner, within the past six months, performed services in connection with the erection of an addition to the present state normal school building at Dillon, Montana, in the capacity of an architect and as superintendent of the construction of said addition, of the reasonable value of twelve hundred dollars.

VI.

That the claim of your petitioner for such amount as the value of such services was presented to the executive board of the
3 state normal school, and by the said board approved, and was also approved and ordered paid by the state board of examiners, whereupon a warrant was issued to your petitioner by the state auditor of Montana in the words and figures following:

"STATE OF MONTANA:

No. 2617.

HELENA, MONTANA. *Oct.* 6, 1905.

State Warrant. $1200.00.

The Treasurer will pay to C. S. Haire or order Twelve Hundred Dollars for services as architect out of any moneys in the treasury in the Normal School Bond Fund.

H. R. CUNNINGHAM,
State Auditor.
C. D. FRENCH, *Dep-ty.*"

VII.

That your petitioner presented said warrant to the respondent herein for payment, and payment thereof was refused.

VIII.

That there are no funds available for the payment of said warrant except the proceeds from the sale of said bonds.

IX.

That the respondent refused, and still refuses, to pay said warrant, for the reason, as given by him, that he has been advised by the attorney-general of the State of Montana that the bonds so issued as aforesaid are illegal because (1) the proceeds derived from the sale of the lands granted to the State of Montana for the different educational institutions by Section 17 of an act of Congress entitled "An Act to provide *the* the division of Dakota into two states and
4 to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the

original states, and to make donations of public lands to such states," approved February 22, 1889, can not lawfully be used, and the interest and income thereof can not be used for any purpose except the support and maintenance of such educational institutions; (2) because the issuance of said bonds created an indebtedness against the State of Montana in excess of one hundred thousand dollars; and (3) because the law authorizing the issuance of said bonds is in violation of the constitution of the State of Montana.

X.

That patents have been issued by the United States government for a large part of said lands granted to the State of Montana by said act of Congress.

XI.

That this application is made to this court for the reason that it involves a matter of grave public interest, in that if said bonds are declared illegal the decision of this court will, not only affect said bonds, but also affect other bonds amounting to several hundred thousand dollars, which have been prior to January 1st, 1905, issued and sold upon the faith and credit of the proceeds derived and to be derived from the sale of the lands granted by Section 17 of said act of Congress for the different educational institutions therein mentioned.

XII.

That your petitioner has no plain, speedy or adequate remedy in the ordinary course of the law.

5 Wherefore, your petitioner prays that an alternative writ of mandate issue out of this court directed to said respondent, as state treasurer of the State of Montana, requiring him to pay said warrant out of the fund created by the purchase of said bonds, or show cause before this Honorable Court, at a time to be named, why he has not done so.

CARPENTER, DAY & CARPENTER,
W. T. PIGOTT AND
M. S. GUNN, *Attorneys for Relator.*

STATE OF MONTANA, *County of Lewis and Clark, ss:*

Charles S. Haire, being first duly sworn, on oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the statements therein contained are each and all true.

CHARLES S. HAIRE.

Subscribed and sworn to before me this 1st day of December, 1905.

[NOTARIAL SEAL.] T. A. MAPES.
Notary Public in and for Lewis and Clark County, Montana.

6 EXHIBIT A.

UNITED STATES OF AMERICA.

State Board of Land Commissioners.

No. —. $1000.

State Normal School Four Per Cent. Bond of 1905.

Know all men by these presents: That the State Board of Land Commissioners of the State of Montana is justly indebted for the money borrowed, and, for value received, does hereby promise to pay to the bearer, on the first day of May, 1925, or on the first day of May, 1915, at the option of said Board, the principal sum of one thousand dollars ($1,000) with interest thereon at the rate of four per cent. per annum, payable semi-annually, on the first day of November and the first day of May of each year, as evidenced by, and upon the presentation and surrender of the annexed interest coupons as they shall severally become due; both such principal and interest payable in lawful money of the United States of America, at the office of the State Treasurer of the State of Montana, in the City of Helena.

This bond is one of a series of seventy-five bonds of the denomination of One Thousand Dollars, each of like tenor and date, and numbered from one to seventy-five, inclusive, and aggregating the sum of Seventy-five Thousand Dollars ($75,000). The right is hereby reserved to redeem this bond at any regular interest period, as stated herein, on or after three years from the date hereof, upon the payment of the principal and interest in full to the date of redemption, and a premium upon the face value of the bond of five per cent.; provided that not less than sixty days' notice shall be given by the State Treasurer of such intention to redeem by pub-
7 lication in not less than one newspaper published in the City of New York, and one newspaper published in the City of Helena, Montana; and, provided further, that such redemption shall be made by serial number beginning with the bond bearing the last number then outstanding.

This bond, as well as the others of this series above described, is issued for the purpose of providing funds to erect, furnish and equip an addition to the present State Normal School Building, at Dillon, Montana, pursuant to and in full compliance with the provisions of an act of the legislative assembly of the State of Montana, entitled: "An Act to Enable the Normal School land grant to be further utilized in providing additional buildings and equipment for the Montana State Normal College," approved February 2, 1905, by which said act all funds realized from the sale or the leasing of the lands, and licenses to cut trees thereon, said lands comprising one hundred thousand acres, granted by the United States to the State of Montana for the establishment and maintenance of a state normal school, under and by virtue of the provisions of Section 17 of the Act of Congress approved February 22, 1889, entitled: "An

Act to provide for the division of Dakota into two states and to enable the people of North Dakota, South Dakota, Montana and Washington to form State Governments and to be admitted to the union on an equal footing with the original states, and to make donations of public lands to such states," are authorized to be pledged, and are in pursuance thereof hereby pledged as security for the payment of the principal and interest of this bond and all others of this series, except such sums as may be necessary for the payment of the bonds heretofore issued against such funds, and the interest thereon.

8 It is hereby recited and certified that this bond is issued in strict compliance with and conformity to the provisions of the above mentioned Act of the Legislative Assembly of the State of Montana, authorizing this bond issue, and the constitution and laws of the State of Montana, and that all acts, conditions and things required and necessary to be done precedent to the issuance of this bond, and in the execution thereof, have been duly, properly, regularly and legally done, had and performed, and the full faith and diligence of the State Board of Land Commissioners are hereby irrevocably pledged for the faithful collection and application of said funds for the payment of this bond and the interest thereon, as herein and in said act provided.

In witness whereof, the State Board of Land Commissioners have signed this bond and caused the same to be countersigned by the Secretary of State of the State of Montana, who has attached the Great Seal of the State hereto, and the interest coupons hereto attached to be signed with the lithographic signature of said Secretary of State; all as of date this first day of May, 1905.

J. K. TOOLE, *Governor,*
W. E. HARMON,
Superintendent of Public Instruction,
A. N. YODER,
Secretary of State,
ALBERT J. GALEN,
Attorney General,
State Board of Land Commissioners.

Countersigned:
A. N. YODER,
Secretary of State.

9 Endorsed: Filed Dec. 1st, 1905. John A. Athey, Clerk.

Minutes of the Court, December 1st, 1905.

Order Directing Issuance of Alternative Writ.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

The relator's petition for writ of mandate herein, was this day presented to the court, and thereupon, after consideration, it is by the court, ordered that an alternative writ of mandate issue, returnable on Saturday, December 9th, A. D. 1905.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

Alternative Writ of Mandate.

The State of Montana to James H. Rice, Treasurer of said State Greeting:

Whereas, it appears from the petition of Charles S. Haire, relator in the above entitled cause, that the state board of land commissioners of the State of Montana, pursuant to an act of the legislative assembly of Montana entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the Montana state normal college," approved February 2, 1905, issued coupon bonds to the amount of seventy-five thousand dollars; that said bonds were offered for sale and sold to the State of Montana, the said state purchasing the same as an investment of the permanent school fund; that at the time of said sale and ever since there has been to the credit of the permanent school fund an amount of money largely in excess of the purchase price of said bonds; that relator performed services in the capacity of an architect and as superintendent of construction of an addition to the state normal school at Dillon, of the reasonable value of twelve hundred dollars; that the claim of relator for such services was presented to and approved by the executive board of the state normal school and was also approved and ordered paid by the state board of examiners, whereupon a warrant was issued by the state auditor directing the treasurer to pay to relator the said sum of twelve hundred dollars out of any moneys in the treasury in "the normal school bond fund;" that there are no funds available for the payment of said warrant except the proceeds from the sale of said bonds; that relator presented said warrant for payment, and payment thereof was refused. It further appearing that relator has no plain, speedy or adequate remedy in the ordinary course of the law, and that it is a proper case for the issuance of a writ of mandate from this court:

Wherefore, we do command you that immediately after the receipt of this writ you pay said warrant out of the funds created by the sale of said bonds, or that you show cause before this court on the 9th day of December, 1905, at the opening of court on that day, why you have not done so.

Witness the Honorable Theodore Brantly, Chief Justice of said Court, at Helena, Montana, and the seal of said Court this 1st day of December, 1905.

[COURT SEAL.] JOHN T. ATHEY, *Clerk.*

Let the above writ issue.

____ ____,
Chief Justice.

Service hereof is hereby accepted for and on behalf of Respondent this 1st day of December, 1905.

ALBERT J. GALEN,
Att'y General.

Endorsed: Filed Dec. 1, 1905. John T. Athey, Clerk.

12 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

Demurrer.

Now comes the Respondent in the above entitled proceeding and demurs to the petition for Alternative Writ of Mandate herein filed, for that:

I.

Said petition does not state facts sufficient to constitute a cause of action, or to entitle the relator to the relief demanded, or any relief, at the hands of this Court.

ALBERT J. GALEN,
Attorney General,
W. H. POORMAN,
Assistant Attorney General
E. M. HALL,
Assistant Attorney General,
Attorneys for Respondent.

Service of a copy hereof is hereby admitted this 8th day of December, 1905.

M. S. GUNN,
W. T. PIGOTT,
CARPENTER, DAY & CARPENTER.

13 Endorsed: Filed Dec. 9, 1905. John T. Athey, Clerk.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, Respondent.

Motion to Quash.

Now comes the respondent in the above entitled proceeding and moves this honorable court to quash, vacate, and set aside, the Alternative Writ of Mandate heretofore and on December 1st, 1905 issued out of said court in said proceeding, for that:

I.

Said petition upon which said Writ was issued does not state facts sufficient to constitute a cause of action, or to entitle Relator to the relief demanded, or any relief, at the hands of this Court.

II.

Said petition shows on its face that the Act of the Legislature mentioned therein, pursuant to which the bonds mentioned in the said petition were issued, is in violation of the provisions of the Act of Congress, approved February 22nd, 1889, known as "The
14 Enabling Act" of Montana, and of the provisions of the Constitution of Montana.

III.

Because said petition shows on its face that the issue of bonds mentioned therein created an indebtedness against the State of Montana in excess of One Hundred Thousand Dollars, without the law authorizing the issue of such bonds having been first submitted to and approved by the people at a general election in the manner provided in the Constitution of the State.

ALBERT J. GALEN,
Attorney General,
W. H. POORMAN,
Assistant Attorney General,
E. M. HALL,
Assistant Attorney General,
Attorneys for Respondent.

Service of a copy hereof is hereby admitted this 8th day of December, 1905.

M. S. GUNN,
W. T. PIGOTT,
CARPENTER, DAY & CARPENTER.

Endorsed: Filed Dec. 9th, 1905. John T. Athey, Clerk.

15 *Minutes of the Court, January 9th,* 1906.

Order Amending Title of Cause and Adjudging that Alternative Writ be Quashed and Proceedings Dismissed.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

This cause this day came on for the judgment and decision of the Court. It is ordered, that the words "as State Treasurer," follow the name of James H. Rice, in the title, making the same read: James H. Rice, as State Treasurer, Respondent, and that the same

correction be made in all records and papers pertaining to said cause.

Whereupon, on consideration, it is now here ordered and adjudged by this Court, that the Alternative Writ of Mandamus be quashed and these proceedings are dismissed at the cost of the relator. Opinion by Mr. J. Holloway, Mr. Chief Justice Brantly concurring; Mr. J. Milburn concurring specially.

16 No. 2258.

STATE OF MONTANA:

In the Supreme Court, December Term, 1905.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

Submitted December 9, 1905; decided January 9, 1906.

Filed January 9, 1906. John T. Athey, Clerk.

Mr. Justice HOLLOWAY delivered the opinion of the Court:

The Ninth Legislative Assembly of Montana passed an Act entitled "An Act to enable the Normal School Land Grant to be further utilized in providing Additional Buildings and Equipment for the Montana State Normal College," approved February 2, 1905. This Act authorizes the state board of land commissioners to issue bonds, sell the same, and apply the proceeds to the erection,
17 furnishing and equipment of an addition to the present state normal school building at Dillon. It is provided that the funds realized from the sale or leasing of the lands granted by the United States to Montana for state normal school purposes (100,000 acres), and the licenses receiver from permits to cut timber on any of said lands, are pledged as security for the payment of the principal and interest on such bonds, except such sums as may be necessary to pay other bonds heretofore issued. There is the further provision that the State of Montana shall not be liable for the payment of the bonds or the interest.

Pursuant to the provisions of this Act the state board of land commissioners issued coupon bonds to the amount of $75,000, dated May 1, 1905, in denominations of $1,000 each, bearing interest at four per cent. per annum, payable semi-annually, and caused the same to be executed as prescribed by such Act. Thereafter such bonds were duly advertised for sale by the state treasurer, and the state board of land commissioners submitted a bid for said bonds at par as an investment for the permanent common school fund, which bid was accepted and, presumably, the money for the bonds paid over to the credit of the building fund of the Normal School, although this does not appear affirmatively from the petition filed herein.

This relator, having performed services in connection with the

erection of the addition to the State Normal School building, presented a claim for $1,200 to the executive board of the State Normal School, which was allowed and approved by that board, and allowed and ordered paid by the state board of examiners, a warrant issued for the same by the state auditor, and this warrant*ed* presented by the relator to the state treasurer who refused to pay it.
18 Thereupon this proceeding in *mandamus* was commenced to compel the state treasurer to pay said warrant. An alternative writ and an order to show cause issued, and upon the return the state treasurer, represented by the attorney general, moved to quash the alternative writ and dismiss the proceedings upon the ground that the petition for the writ does not state facts sufficient to entitle the relator to any relief.

The contention of the respondent is, that the Act of the Legislative Assembly above referred to is unconstitutional, first, because the Act authorizes the expenditure of funds received from the sale of the Normal School lands for the payment of these bonds; second, because the issuance of said bonds increases the indebtedness against the state of Montana to an amount in excess of $100,000; and, third, because the Act authorizes the expenditure of the money for the erection of a building for the State Normal School.

By the provisions of Section 17 of the Act of Congress, approved February 22, 1889 (25 Stat. at Large, 676), commonly known as the Enabling Act, there was granted to the State of Montana "For State Normal Schools" 100,000 acres of the public land. Other grants were made for the School of Mines, the Agricultural College, the State Reform School, the Deaf and Dumb Asylum, and the State Capital Buildings; and by other sections of the same Act a grant of 72 sections of the public land was made for a University, and grants, additional to those mentioned in Section 17, for the State Capital Buildings and Agricultural College. Other like grants of land were made by the same Act to the states of North Dakota, South Dakota and Washington, and of the grants made by Section 17 it is said:
"And the lands granted by this section shall be held, appro-
19 priated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

Section 5 of the Act of February 2, 1905, provides, that the state treasurer shall keep all moneys derived from the sale, leases, or sale of timber from lands granted in aid of the State Normal School, in a separate fund to be known as "The State Normal School Fund," and out of this fund he shall pay the interest on these bonds as it accrues, and the principal at maturity.

Section 12 of Article XI of the Constitution of Montana provides: "The funds of the State University and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties shall be de-

voted to the maintenance and perpetuation of these respective institutions."

Beyond question the State Normal School is one of the institutions of learning to which reference is here made, and as it "is the only one with which we are directly concerned in this proceeding, we may paraphrase section 12 above, as follows: The funds of the State Normal School, from whatever source secured, shall be invested as prescribed by law, and the interest from such invested funds, together with the rents from leased lands belonging to the Normal School grant, shall be devoted to the maintenance of such Normal School.

The provisions of this section of the Constitution are
20 mandatory and prohibitory. (Section 27, Article III.) *The funds* referred to mean *all* funds. They shall be invested *to draw interest* and used for no other purpose. The interest from such invested funds, and the rents from lands belonging to this grant which have not been sold,—and not the principal sum derived from the sale of such lands or from the sale of timber,—shall be used for the maintenance and perpetuation of the Normal School, and for no other purpose.

If, then, the principal sum received from the sale of lands belonging to the Normal School grant must be invested to draw interest, that principal sum cannot be used to pay off the principal of or interest on the bonds authorized by the Act of February 2, 1905, as provided by such Act. The legislature might have provided by that Act that the money received from the sale of Normal School lands and timber from lands belonging to that grant should be invested, and that the interest from such investment and the rental from leased lands belonging to the Normal School grant should be set apart to pay the interest on these bonds and discharge the bonds themselves at maturity, and had it done so, it would have been carrying out the intent and purpose of the Enabling Act and the provisions of the Constitution.

It is apparent from the most casual reading of section 12 of Article XI of the Constitution, and section 5 of the Act of February 2, 1905, above, that as soon as the treasurer receives any moneys from the sale of Normal School lands or timber therefrom into "The State Normal School Fund," such moneys shall be invested to draw interest, under such regulations as may be prescribed by law, and that only the interest on such invested funds, together with the
21 rents from leased lands, can be devoted to the maintenance and perpetuation of the Normal School. If this section of the Constitution is to be given force and effect, it is apparent that the Act in diverting the moneys received from the sale of Normal School lands, or the sale of timber therefrom, to the payment of these bonds is in direct violation of the provisions of this section of the Constitution.

But on behalf of the relator it is contended that by the terms of section 17 of the Enabling Act, the lands granted to the state for Normal School purposes are to be held, appropriated and disposed of for Normal School purposes in such manner as the legislature

of Montana may provide, and that this Act is sufficiently broad to warrant the legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if section 12 of Article XI of the Constitution contravenes the provisions of section 17 of the Enabling Act, section 12 is invalid and of no force or effect. It is perfectly apparent, then, that in order to hold the Act of the legislature approved February 2, 1905, binding and the bonds issued in pursuance thereof valid, this court must hold section 12 of Article XI of the Constitution inoperative and of no effect. However, as the Constitution of Montana is the supreme law of this State, aside from the provisions of the Constitution of the United States and the treaties made and statutes enacted in pursuance thereof, it becomes incumbent upon this court to reconcile, if possible, the provisions of our Constitution with the Enabling Act under which the Constitution was adopted and the state admitted into the Union, for, however reluctant a court is to declare unconstitutional and invalid an Act of a legislative
22 assembly, it will with even greater hesitation hold inoperative and invalid a provision of a state Constitution.

It is to be observed that the lands granted to the state by the Enabling Act are granted for specific purposes which are clearly defined: 100,000 acres are granted for State Normal Schools, and the only limitation upon the grant is, that such lands shall be held, appropriated and disposed of exclusively for the purposes mentioned, in such manner as the legislature may provide. Under section 17 above, the legislature might designate the agent to select and classify the lands. It might specify that the lands should be sold at private sale or at public auction. It might specify the quantity of land to be sold at any one time, or the amount to be sold to any one individual. It might provide the terms upon which the land should be sold, and the price to be received for it. It might make suitable provision for renting the land, and fix the amount to be let to any one person and the price at which it should be let; and, finally, it might make provision for the sale of growing trees upon the lands selected under the terms of this grant. All of these provisions in section 17 were met by legislative enactment comprised in Title VIII, Part III, of the Political Code.

The question now arises: Does section 12 of Article XI of the Constitution contravene the provisions of section 17 of the Enabling Act? Is there any conflict between the provisions of the Enabling Act, which grants to the state legislature authority to prescribe the manner in which these Normal School lands shall be held, appropriated and disposed of—and the provisions of section 12 of Article XI of the Constitution, which provides that the funds of the State Normal School shall be invested and only the interest
23 from the invested funds, together with the rent from leased lands, may be used for the maintenance and perpetuation of the State Normal School? We are of the opinion that there is no conflict whatever. Under the provisions of section 17 of the Enabling Act the legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and can not

control the funds derived from sales or leases except in conformity with the constitutional provisions of section 12 of Article XI above.

The lands were granted to the state of Montana—not to the Legislative Assembly. The legislature may say how the lands shall be held; but it is the state which holds them—which has title to them. It is the state which says what shall be done with the lands. The legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived from sales or leases pass to the state, to be disposed of by the state as it may see fit, subject only to the condition that they shall be used exclusively for Normal School purposes. The state may act through its constitutional convention, and, if it does so, such action is conclusive. In the absence of constitutional provision, it may act through its Legislative Assembly. Therefore, when the Constitution says that all moneys coming into the State Normal School fund, from whatever source, shall be invested and only the interest and rental from leased lands shall be used for Normal School purposes, the legislature may prescribe the manner in which the funds shall be loaned, but it can not say that they shall go into any other channel. The absence of any constitutional provision respecting the grant for Capital Building purposes, and the grant of the Penitentiary at Deer Lodge city and the lands connected therewith, left the legislature free to make such disposition of these grants as it saw fit, so long as the original purpose of the respective grants was observed.

In the very highest sense the purpose of the grant in aid of the State Normal School is observed and carried into effect by section 12 of Article XI of the Constitution. In the wisdom of the framers of that instrument, provision is made for the support of our State Normal school for all time. The principal sums derived from the sales of the lands or of the timber are made to serve this institution by earning interest which may be applied to its maintenance and perpetuation, while the principal sums themselves are kept inviolate. That this is what is meant by section 17 of the Enabling Act and section 12 of Article XI of the Constitution seems to- clear for argument. This construction is merely giving meaning to the plain and explicit language of these sections, does no violence whatever to the terms of either, and permits each to remain in full force and effect—a result which the court is compelled to reach, if possible, and one which can not be avoided without reading into the terms of the Enabling Act language which is not to be found there.

A great deal of consideration was given by counsel to the question whether or not the language of section 11 of the Enabling Act modifies the language of section 17; and while we are of the opinion that it does not do so, under our view of the case it is not necessary to give further attention to this feature of the case.

Neither are we disposed to enter into a discussion now as to whether the bonds authorized by the Act increases the State debt.

So far as the other question is concerned it need only be noticed in passing. The United States granted 100,000 acres of land

to Montana "for State Normal Schools." The Congress was only concerned in seeing that this grant was applied to the purpose for which made. It was apparent that in order to be available, the lands must be utilized, and the Congress therefore left it to the legislature of this state to designate the manner in which such lands should be held, appropriated or disposed of; but it went no further than this. It did not attempt to say when the Normal School should be instituted; how many Normal Schools should be established; or how the funds derived from the sale of leasing of these lands should be controlled or made to work out most effectually the end sought by the grant.

The constitutional convention adopted Ordinance No. 1, whereby the grant of these lands was accepted upon the terms and conditions provided in the Act; and as an extra precaution and as an additional safeguard, section 12 of Article XI of the Constitution was adopted, making the grant in fact an endowment, and only the interest and rental immediately available for the use of the school and such interest and rental may be used for any legitimate purpose connected with the maintenance or perpetuation of the school.

But it is said that other like bond issues have been made against these various land grants, and that for a number of years the legislative and executive branches of this state government have given to section 17 of the Enabling Act the construction for which contention is now made by this relator, and that such construction ought
26 to be given great weight by this court. But, as said before, such construction has the effect of nullifying a section of our State Constitution, and this court ought to be slow indeed to declare such a result, no matter if the legislative and executive branches of the state government may have done so. Furthermore, the rule that contemporaneous construction by the department specially delegated to carry into effect a particular provision of law shall raise a strong presumption that such construction rightly interprets the provision, only becomes effective when there is a reasonable doubt as to the meaning of the provision. Such construction can never abrogate the text or fritter away its obvious sense. And acquiescence for no length of time in a construction by the coordinate branches of government which has the effect of nullifying a provision of the Constitution, will justify a court in adopting such construction unless it is the only reasonable one. (Cooley on Constitutional Limitations, 7th ed., 104–106.) Furthermore, such construction to be available as an argument, must have been uniform, and such is not the fact with reference to the subject now under consideration.

The Enabling Act was passed February 22, 1889, and it is not contended that any attempt was ever made by the legislative or executive departments of the state government to give to section 17 the construction now claimed for it by the relator, prior to March 6, 1895, when the first of these bond issues was authorized (Secs. 1630–1637, Political Code); so that the construction thereafter given by the legislature was not in fact contemporaneous with the passage of the Act. But, on the other hand, the constitutional convention met in July, 1889, and adopted section 12 of Article XI as the ex-

pression of its interpretation of section 17 of the Enabling
27 Act, and the Second Legislative Assembly passed an Act entitled "An Act to Provide for the Selection, Location, Appraisal, Sale and Leasing of State Lands," approved March 6, 1891 (Laws of 1891, page 174*a*), by the terms of which it is specifically provided that all moneys derived from the sale of these lands shall be invested, and only the interest of such invested funds and rental from leased lands shall be used for the purpose for which the grant was made. These provisions were re-enacted in an Act of the Third Legislative Assembly, approved March 9, 1893 (Session Laws, 1893, page 49), and again re-enacted in a Code provision (Sec. 3509, Political Code), approved February 25, 1895.

Thus, within five months after the Enabling Act was passed, we have a construction of section 17 of it, by the constitutional convention, directly opposed to the view now urged by relator; and we further have apparently the same construction placed upon it, or at least an attempt to carry into effect the idea of the framers of the Constitution, by every session of the legislature, barring the first, which did not accomplish anything in the way of legislation,—from the time of the passage of the Enabling Act to March 6, 1895; and it does not affect the result to say that the various institutions had not been established prior to 1893. So that the construction given to section 17 of the Enabling Act by the Montana legislature has not been uniform, even if the terms of that section were of doubtful meaning, which does not appear to be the fact.

We do not think that the construction given to that section since 1895 had been done under such circumstances, or that the result to be anticipated from a different construction now by the courts is of such character as to render applicable here the maxim
28 *"Communis error facit jus."*

It would seem that the Congress meant that the state of Montana should in the first instance build the necessary buildings for a State Normal School out of its own proper funds, and that this bounty should constitute an endowment for the maintenance and perpetuation of such school for all time to come thereafter; and that this was the construction given to section 17 of the Enabling Act by our Legislative Assembly is demonstrated by the action taken by it at the time these several state institutions were established. The Third Legislative Assembly provided for the establishment and location of the Agricultural College, the University, the Normal School and School of Mines, and made an appropriation for each of these institutions. That for the State Normal School is similar to the others and provides for an appropriation of $15,000, and respecting this appropriation the Act says: "The money hereby appropriated, shall be expended under the direction of the State Board of Education, in the manner and under such restrictions as may be provided by law, and for the purpose of establishing said State Normal School, by commencing the construction of suitable buildings for maintenance of said State Normal School." It was clearly the understanding of the Legislative Assembly at that time that the state itself must erect the buildings, and it provided for the commencement of such work

evidently with the idea that future legislatures would make other appropriations to complete the work then initiated.

A cardinal principle of statutory construction is, that the court shall, if possible, ascertain the legislative intent. The Enabling Act must be considered as a whole, and some idea of the
29 intention of Congress respecting the grants mentioned in section 17 may be gathered from the other sections of the Act. Generally speaking, the Act treats of grants for the support of Common Schools in sections 10 and 11; for the University in section 14; for the Agricultural College in section 16; and for these other institutions in section 17. With respect to the grant for the support of the Common Schools it is said, that the lands shall be sold and "the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools." With respect to the grant for the support of a University it is said, that these lands shall be sold "and the proceeds shall constitute a permanent fund to be safely invested, * * * and the interest thereof be used exclusively for university purposes." With respect to the grant for the support of an Agricultural College it is provided that the state shall accept the grant with the limitations imposed by the Act of Congress of July 2, 1862 (12 Stat. at Large, 503); and that Act provides that these lands shall be sold and all moneys derived from such sale "shall be invested * * * ; and that the money so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, * * * and the interest of which shall be inviolably appropriated, * * * to the endowment, support and maintenance of" such college.

If the government has a policy respecting these grants for educational purposes, these provisions would indicate that such policy contemplates that the respective grants shall operate as endowments, and that policy is clearly carried into effect by the provisions of section 12 of Article XI of the Constitution.

30 While we do not agree with the reasoning of the supreme courts of Washington and North Dakota respecting the meaning of section 11 of the Enabling Act, it is interesting to note that they have held legislation of the character of the Act of February 2, 1905, invalid, and bond issues similar to that authorized by our legislature, void, and that, too, under the same Enabling Act and somewhat similar constitutional provisions. (State *ex rel.* Heuston *v.* Maynard, 31 Wash. 132, 71 Pac. 775; State *ex rel.* Board *v.* McMillan, (N. D.), 96 N. W. 310.)

The Act of the legislature now under consideration in authorizing the expenditure of moneys received from the sale of Normal School lands, or the timber on lands granted in aid of the State Normal School, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of section 12, Article XI, of the state Constitution, and is therefore void and of no effect; and, being so, the state treasurer rightly refused to proceed under it and can not be coerced by *mandamus*.

The alternative writ of mandamus is quashed and these proceedings are dismissed.

Dismissed.

WM. L. HOLLOWAY,
Associate Justice.

I concur:
THEODORE BRANTLY,
Chief Justice.

Mr. Justice MILBURN: I concur in the opinion. I think it is well, however, inasmuch as a great deal is said in the opinion, and very properly, in regard to contemporaneous construction, that the
31 statements made in the body of the bonds themselves in respect of the validity thereof, should appear. Section 3470 of the Political Code declares that the governor, the superintendent of public instruction, the secretary of state, and the attorney general shall constitute the state board of land commissioners. As appears from an inspection of the bonds, these officers signed each of said bonds. In each bond appears the following statement: "It is hereby recited and certified that this bond is issued in strict compliance with and conformity to * * * the constitution and laws of the state of Montana, and that all acts, conditions and things required and necessary to be done precedent to the issuance of this bond, and in the execution thereof, have been duly, properly, regularly and legally done, had and performed, and the full faith and diligence of the state board of land commissioners are hereby irrevocably pledged for the faithful collection and application of said funds for the payment of this bond and the interest thereon as herein and in said Act provided." As shown in the opinion, the bonds are not in compliance with the Constitution. I think it proper that this construction of the law by the several executive officers of the state who signed the bonds, given at the time of the issuance of the bonds, should appear as part of the history of the case.

That part of section 17 of the Enabling Act saying that "the lands granted * * * shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned, in such manner as the legislatures of the respective states may severally provide," means in my opinion, in a few words, this: that the legislature may say *how*
the lands may be sold, but does not mean that they shall say
32 what shall be done with the proceeds. The Constitution, in my opinion, is controlling in the matter, and is not in violation of any of the provisions of the Enabling Act.

GEO. R. MILBURN,
Associate Justice.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

Petition for Rehearing.

The relator in the above entitled cause respectfully petitions this Honorable Court for a rehearing upon the grounds and for the reasons following:

1. Because the opinion is inconsistent and contradictory.

2. Because the court does not give any force or effect to the requirement of Sec. 17 of the Enabling Act that the lands granted for a state normal school shall be *appropriated* for the purpose for which the grant is made, and in other respects misconstrues said Sec. 17.

3. Because the court misconstrues Sec. 12 of Art. XI of the
33 Constitution of Montana.

I.

In the opinion it is said, with reference to the Act of the Legislative Assembly of Montana, approved February 2, 1905:

"The legislature might have provided by that act that the money received from the sale of normal school lands and timber from the lands belonging to that grant should be invested, and that the interest from such investment and the rental from leased lands belonging to the normal school grant should be set apart to pay the interest on these bonds and discharge the bonds themselves at maturity, and had it done so, it would have been carrying out the intent, and the purpose of the Enabling Act and the provisions of the Constitution."

The Act of the Legislative Assembly of Montana, approved February 2, 1905, is entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the Montana state normal college."

In Sec. 7 of the Act it is provided that "the moneys derived from the sale of said bonds shall be used to erect, furnish and equip an addition to the present state normal school building, at Dillon, Montana."

In the opinion it is also said:

"It would seem that the congress meant that the State of Montana should in the first instance build the necessary buildings for a state normal school out of its proper funds, and that this bounty should constitute an endowment for the maintenance and perpetuation of such school for all time to come thereafter."

If the meaning or intent of congress is as expressed in the last quotation made, then by what course of reasoning or construc-
34 tion of the Enabling Act can it be said that if the Act of the Legislative Assembly of Montana, approved February 2, 1905, had provided that the proceeds from the sale of the lands should be invested, "and the interest from such investment and the rental from

leased lands belonging to the normal school grant should be set apart to pay the interest on these bonds and discharge the bonds themselves at maturity, * * * it would have been carrying out the intent and purpose of the Enabling Act," when the act of the Legislative Assembly of Montana provided that the money realized from the sale of the bonds should be used "to erect, furnish and equip an addition to the present state normal school building?"

In the opinion it is said:

"The absence of any constitutional provision respecting the grant for capital building purposes, and the grant to the penitentiary at Deer Lodge city and the lands connected therewith, left the legislature free to make such disposition of these grants as it saw fit, so long as the original purpose of the respective grants was observed."

As we construe the language of this court just quoted, it is held thereby that, except for the provision of Sec. 12 of Art. XI of the Constitution, the legislature might provide for the use of the proceeds derived from the sale of the lands the same as has been done with reference to the proceeds of the lands granted for public buildings at the capital of the state.

In the opinion it is further said, with reference to the proceeds of the lands granted for a state normal school:

"The principal sums derived from the sales of the lands or timber are made to serve this institution by earning interest which may be applied to its maintenance and perpetuation, while the principal sums themselves are kept inviolate. That this is what is meant by Sec. 17 of the Enabling Act and Sec. 12 of Art. XI of the Constitution seems too clear for argument."

If Sec. 17 of the Enabling Act so clearly means and intends that the proceeds derived from the sale of these lands should constitute a principal sum which should be kept inviolate and that only the interest to be derived from the investment of such sum should be used, then by what course of reasoning or by what rule of construction can it be said that, except for the provisions of Sec. 12 of Art. XI of the Constitution, the legislature would have the right to make such disposition of these grants as has been made of the grants for a penitentiary and for public buildings at the capital?

We submit that in the opinion of this court it is clearly stated: (1) That it was the intention of congress, expressed in the Enabling Act, that the lands granted for a state normal school should constitute an endowment for the maintenance and perpetuation of such school, and that the buildings necessary for such a school should be furnished by the state; (2) that if the legislature had provided in the Act of February 2, 1905, for the application of interest derived from the investment of the proceeds of the lands sold and the rent received for the lands not sold to the payment of the principal and interest of the bonds issued to obtain money with which to erect an addition to the state normal school building at Dillon, such provision would have been valid; (3) that by Sec. 17 of the Enabling Act congress meant and intended that the proceeds derived from the sale of the lands granted to the state normal school should constitute a fund which should remain inviolate, and that only the in-

terest derived from the investment of such fund should be used
36 to maintain and perpetuate such institution; and (4) that except for the provisions of Sec. 12 of Art. XI of the Constitution, the legislature would be free to make such disposition of the grant for a state normal school as it should see fit. In other words, it might provide for the use of the proceeds as it has done in the case of the grant of land for public buildings at the capital of the state.

We believe that in view of these inconsistencies and contradictions we are justified in asking this court to review the opinion which it has rendered.

II.

Section 17 of the Enabling Act contains the following grant of lands to the State of Montana "for the establishment and maintenance of a school or mines, 100,000 acres; for state normal schools, 100,000 acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, 50,000 acres; for the establishment of a state reform school, 50,000 acres; for the establishment of a deaf and dumb asylum, 50,000 acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, 150,000 acres."

The section further provides that "the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

The provision that the lands granted by the section shall be held, appropriated and disposed of exclusively for the purposes therein mentioned is not limited to the grant for a state normal
37 school, or to the grants made for the other educational institutions, but applies generally to all lands granted by the section.

If, then, it was the intention of congress that the grant to the state normal school "should constitute an endowment for the maintenance and perpetuation of such school," as stated by the court in its opinion, it certainly follows that the grant for public buildings at the capital of the state should constitute an endowment for the maintenance and perpetuation of such buildings. The only expense of maintaining and perpetuating a capital building is the expense of a janitor, an engineer and the cost of repairs. Can it be that congress had such items of expense in mind in making this grant of 150,000 acres, or did congress intend that the proceeds of the lands should be used to erect the building? Sec. 12 of the Enabling Act contains a grant to each of the states of fifty sections of land "for the purpose of erecting public buildings at the capitals of the states, for legislative, executive and judicial purposes." The grant contained in Sec. 17 for public buildings at the capital of the state is declared to be "in addition to the grant hereinbefore made for that purpose." The purpose of the grant contained in Sec. 12 is to erect buildings, and it necessarily follows that the purpose referred to in Sec. 17 is the same purpose. When, therefore, we consider

the grant for the erection of public buildings at the capital, it is impossible to find the intent that the lands granted should constitute an endowment for the maintenance and perpetuation of such buildings.

Whatever the intent of congress may have been with reference to the use of the proceeds of the lands granted for the erection of buildings at the capital, the same intent existed in making
38 the grant for normal schools. This must be so, or the language used in expressing the intention has one meaning as applied to the grant for a normal school, and another meaning as applied to the grant for buildings at the capital. Sec. 17, when construed solely with reference to the grant of lands for public buildings at the capital should read as follows: There is granted to the state of Montana for "public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acress," and the lands so granted "shall be held, appropriated and disposed of exclusively" for the purpose of public buildings at the capital of the state. When the section is considered solely with reference to the grant for a school of mines it would read: There is granted to the State of Montana "for the establishment and maintenance of a school of mines, one hundred thousand acres," and the lands so granted "shall be held, appropriated and disposed of exclusively" for the purpose of the establishment and maintenance of a school of mines. When all of the grants made by the section, except the grant for state normal schools, are eliminated, it would read: There is granted to the State of Montana "for state normal schools, one hundred thousand acres," and the lands so granted "shall be held, appropriated and disposed of exclusively" for the purpose of state normal schools.

It would seem to be too clear for argument that, if it was intended that the lands granted for a state normal school should be sold, the proceeds invested and the interest from such investment only should be used for the purpose of the grant, it was also intended that the lands granted for the erection of public build-
39 ings at the capital of the state should be sold, the proceeds invested and the interest only should be available for the erection of such buildings. On the other hand, if it was intended that the proceeds derived from the sale of lands granted for public buildings at the capital of the state should be used for the erection of such buildings, it was also intended that the proceeds derived from the sale of lands granted for the state normal school should be used for the purpose for which such grant was made. Let us assume for a moment that it was the intention of congress that the lands granted for public buildings at the capital should be sold, the proceeds invested and the interest only used for the erection of such buildings. Contemplate for a moment, if you will, the construction of the capital building of this state under such circumstances. Then contemplate, if you will, the existence of a fund derived from the proceeds of the sale of 150,000 acres of land, of no use or benefit to the state except as the interest of such fund might be applied to the payment of the expense of a janitor, an engineer

and repairs. Could congress ever have intended that such conditions should obtain? The utter absurdity of providing a fund to maintain and perpetuate the state capital building of Montana absolutely condemns any construction of the Enabling Act which would operate to create such a fund.

This court, in the case of State *v.* Cook, 17 Mont. 529, through Mr. Justice Hunt, said:

"When congress made a grant of land to the state for public buildings at the capital of the state, by Act of Congress, approved February 22, 1889, providing for the admission of the state into the union, it was enacted that the lands so granted should be
40 held, appropriated and disposed of exclusively for the purposes mentioned in the Act, in such manner as the legislature of the state might provide. The state, by Ordinance No. 1, Sec. 7, has accepted these lands for the purposes specified, and by legislation has provided for the erection of a capitol, exclusively out of the moneys from the fund to be created by the disposition of the lands so granted by congress. The state is an agent to carry out the objects of the donation. The fund created by the statute is a trust fund established by law in pursuance of the Act of congress. * * * The state officers have no control over it, except to carry out the trust relation; and the treasurer is merely an agent for receiving and disbursing the fund under the Act of congress, and in manner provided by the law of the state. So, too, the auditor is but one of the agents or sub-agents designated by the law of the state in the execution of the trust. All this seems very clear to us in the law."

Here we have a decision by this court that congress intended that the proceeds of the lands granted for public buildings at the capital should be used for the purpose of erecting such buildings.

In Sec. 14, containing the grant for a state university, it is provided that the lands shall be sold "and the proceeds shall constitute a permanent fund to be safely invested," etc. In Sec. 11, which this court says applies to the grant for common school purposes made by Sec. 10, it is provided that the proceeds shall "constitute a permanent school fund, the interest only of which shall be expended." In the grant for an agricultural college provision is made for the creation of a perpetual fund from the proceeds of the sales of the lands granted. So that, if congress had intended that the proceeds
41 of the lands granted by Sec. 17 should constitute a fund and only the interest should be used, it would certainly have made a provision to that effect as it did with reference to the grants of lands for common schools, for a university and for an agricultural college Instead of so providing it declared in Sec. 17 that the lands shall be "held, appropriated and disposed of exclusively for the purposes herein mentioned."

When it was declared that the lands should be appropriated it certainly was not meant that the rent derived from leasing the lands and the interest received from an investment of the proceeds of the lands sold should be appropriated. The lands are granted to the state, and the same lands are required to be appropriated for certain

purposes. No one could be found who would say that congress did not intend to grant the lands, but only the rent which might be derived from leasing the lands and the interest which might be obtained from the investment of the proceeds of the lands sold. It would seem to us that there is as much reason for saying that the lands were not granted as there is for saying that the lands are not to be appropriated, but only the rent which may be obtained from leasing the lands and the interest which may be received from an investment of the proceeds of the lands sold, are available for use. In Sec. 20 we find the word "appropriated" is used. In that section it is provided "that the sum of $20,000, or so much thereof as may be necessary, is hereby appropriated * * * for defraying the expenses" of the constitutional convention. Here the meaning of the word "appropriated," as used in the Enabling Act, is clearly shown.

In the opinion of this court it is said:

"Under the provisions of Sec. 17 of the Enabling Act the
42 legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and can not control the funds derived from sales or leases except in conformity with the constitutional provisions of Sec. 12 of Art. XI above."

Notwithstanding Sec. 17 declares that the lands shall be *appropriated* for the purposes for which the grants are made, this court says that the legislature has to do only with the "management and disposition of the lands themselves," and the right to control the funds received from sales and leases can not be exercised except in conformity with the Constitution. In other words, this court holds that the authority to manage and dispose of the lands in conferred by the Enabling Act, and the authority to appropriate the lands or the proceeds of such lands is conferred by the Constitution. So that, either no significance whatever is attached to the language of the Enabling Act conferring power upon the legislature to appropriate the lands, or Sec. 12 of Art. XI of the Constitution is considered as superior to the Enabling Act. The Constitution of the United States provides that such Constitution and "the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the laws or constitution of any state to the contrary notwithstanding." If, then, there is any conflict between Sec. 12 of Art. XI of the Constitution and the Enabling Act, the Constitution must yield. This proposition is fully discussed in the briefs of the relator, to which reference is hereby made.

The word "appropriated" means "applied." For a discussion of
43 the word "appropriated" and the sense in which it is used by congress in making grants of lands, reference is hereby made to the briefs for relator.

By Sec. 17 lands are granted to the state "for the establishment and maintenance of a school for mines * * * ; for state normal schools * * * ; for agricultural colleges." The sentence containing the grants for the different educational institutions referred to is an eliptical sentence. It is clearly to be inferred that the grant for a state normal school is for the "*establishment* and mainte-

nance of such institution. The rules of grammar will not admit of any other construction of the language used. Grants are also made "for the establishment of a state reform school," and "for the establishment of a deaf and dumb asylum." The school of mines, the normal school and the agricultural college are educational institutions; the reform school is a reformatory institution, and the deaf and dumb asylum is a charitable institution. We find that in Sec. 17 reference is made to educational, charitable, penal and reformatory institutions. It is evident that congress intended to provide for both the establishment and maintenance of the educational institutions, and intended to provide for only the establishment of the other institutions. The provision for both the establishment and maintenance of the educational institutions is in keeping with the general policy of the federal government to promote education. On the other hand, there is no reason why the charitable, penal and reformatory institutions should not be maintained at the expense of the state. The intention of congress to make provision for both the establishment and maintenance of the educational institutions and to provide for only the establishment of a reform school and a deaf and dumb asylum, is evidenced by the quantity of land granted
44 for these respective institutions. One hundred thousand acres is granted for a normal school and only fifty thousand acres for the reform school. It was evidently contemplated that one hundred thousand acres would be sufficient to provide for the establishment and maintenance of a normal school. The same is true with reference to the school of mines and the agricultural college.

Sec. 17 provides that the lands granted for the reform school shall be held, appropriated and disposed of exclusively for the purpose of the establishment of a state reform school. There is no basis whatever for saying that the grant for a state reform school is for the maintenance and perpetuation of such institution. The word "establish" does not mean "maintain." It is apparent that when congress intended that a grant should be for the purpose of *maintaining* an institution it used the proper word to express its intention.

Instead, therefore, of its being the intention of congress that the buildings of the state reform school should be provided by the state and the lands granted should be treated as an endowment to maintain and perpetuate the state reform school, as this court seems to hold, it was clearly the intention of congress that the lands should be *appropriated* to *establish* the institution, and the institution, after being established should be maintained and perpetuated by the state. The word "establish" includes the erection of buildings. The Constitution of the United States grants power to congress to establish post offices and post roads. It is pursuant to this power that the federal building in Helena was erected, and post office buildings have been erected throughout the United States.

45 If we are to say that congress, by providing for the *establishment* of a state reform school, intended to provide for the *maintenance* and *perpetuation* of such school, and in providing that the lands granted for the establishment of such institution shall be *appropriated* to such purpose, intended that only the

rent to be derived from the leasing of such lands and the interest from the investment of the proceeds of such part of said lands as might be sold, shall be appropriated, we are compelled to attribute to the members of congress a very slight knowledge of the English language.

If it was intended, as it clearly was, that the proceeds received from the sale of the lands granted for a state reform school should be used for the establishment of such an institution, then it necessarily follows that it was the intention of congress that the proceeds of the lands granted for the state normal school should be available for the purpose of the grant made for such institution. What has been said with reference to the language expressing the intent of congress embracing the grant for the erection of public buildings at the capital of the state applies equally to the grant for a state reform school.

In the opinion this court said:

"The lands were granted to the State of Montana—not to the legislative assembly. The legislature may say how the lands shall be held; but it is the state which holds them—which has title to them. It is the state which says what shall be done with the lands. The legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived
from sales or leases pass to the state, to be disposed of by the
46 state as it may see fit, subject only to the condition that they
shall be used exclusively for normal school purposes. The state may act through its constitutional convention, and, if it does so, such action is conclusive. In the absence of constitutional provision, it may act through its legislative assembly."

It is also decided, according to our understanding of the opinion, that except for the provisions of Sec. 12 of Art. XI of the Constitution, the state might, through its legislature, determine whether or not the proceeds derived from the sale of lands should be utilized, or only the interest obtained by the investment of such proceeds could be used. The language of the Enabling Act is that there is granted to the State of Montana "for state normal schools, one hundred thousand acres," and the lands so granted "shall be held, appropriated and disposed of exclusively" for state normal schools in such manner as the legislature of the state may provide. It is true that the grant is to the state, but, as declared in Sec. 1 of Art. XVII of the Constitution, the lands "shall be held in trust for the people, to be disposed of as hereinafter provided," for the purpose for which they have been granted. The state receives the title in trust for the people, who are the beneficiaries. It is not the state to which power is granted to determine the manner in which the lands shall be held, appropriated and disposed of, but such power is conferred upon the legislature of the state. There is a clear distinction between the state and the legislature of the state. In the case of Poindexter *v.* Greenhow, 114 U. S. 270, it is said: "The state is a political corporate body, can act only through its agents, and can command only by

laws." In speaking of the distinction between the govern-
47 ment of a state and the state itself, the court says:

"In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, unchangeable, invisible, immutable. The government is an agent, and, within the scope of the agency, a perfect representative; but outside of that it is a lawless usurpation. The constitution of the state is the limit of the authority of its government, and both government and state are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof."

It would seem that this court, in its opinion, has confounded the legislature of the state with the state itself. As already stated, the grant was made to the state in trust for the people, and it was declared that the trust should be executed by the legislature, not by the state. The legislature is a branch of the state government and, as said in the opinion in the case of Poindexter *v.* Greenhow, *supra,* "both government and state are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof." When, therefore, congress declared that the lands granted should be held, appropriated and disposed of for the purposes for which they were granted in such manner as the legislature of the state might provide, it did not mean to confer power upon the state, but it was clearly the intention to grant the power to the legislature as distinguished from the state. By no rule of statutory con-
48 struction can the word "legislature" be said to mean "state."

It is provided in the Constitution of the United States that "this constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution of laws of any state to the contrary notwithstanding." If, therefore, congress intended that the legislature of the State of Montana should determine whether or not the proceeds received from the sale of the lands granted for a state normal school, or only the interest which might be received from the investment of such proceeds, should be used, the right so to determine having been granted by the law of the United States enacted in pursuance of a provision of the Constitution of the United States granting to congress the power "to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States" (Sec. 3, Art. IV), the state could not, through its constitution or otherwise, limit or impair the power thus granted to the legislature.

III.

We submit that Sec. 12 of Art. XI of the Constitution of Montana does not, when properly construed, require that the proceeds received from the sale of lands granted for state normal schools shall be in-

vested, and prohibit the use of such proceeds, and that if it is to be so construed, it is clearly in conflict with Sec. 17 of the Enabling Act, and of no force or effect whatever. For our views as to the proper construction of Sec. 12 of Art. XI, see the briefs filed in behalf of relator.

49 The attorney general contended that the proceeds received from the sale of lands granted for state normal schools can not be used because of the provisions of Sec. 11 of the Enabling Act. This court has decided that the provisions of Sec. 11 apply only to lands granted for common schools. It was assumed on the argument of this case by the attorneys for the relator that if Sec. 11 does not apply to the lands granted by Sec. 17, then the right to the use of the proceeds received from the sale of the lands granted by such section exists. Under the circumstances, and in view of the fact that the construction adopted by this court was not presented or argued, and in consideration of the importance of the case to the people of Montana, we submit that a rehearing should be granted and argument heard as to the proper construction of Sec. 17, when construed independently of Sec. 11.

Respectfully submitted,

CARPENTER, DAY & CARPENTER,
W. T. PIGOTT,
M. S. GUNN,
Attorneys for Relator.

Service of the within petition admitted and receipt of copy thereof acknowledged this 20th day of January, A. D. 1906.

ALBERT J. GALEN,
Attorney for Defendant.

Endorsed: Filed January 20, 1906. John T. Athey, Clerk.

50 *Minutes of the Court, February 27th,* 1906.

Order Correcting Opinion and Denying Petition for Rehearing.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

It is this day by the court ordered that the following corrections in the opinion heretofore filed in this cause, be made, and that the opinion be engrossed accordingly: viz: strike out the last five words on page 5, and all of first paragraph on page 6. Strike out all of the first paragraph on page 10, after the first sentence thereof. Transpose the order of the paragraph before the last and second before the last with the last paragraph on page 13. After the word "seem," in the last paragraph on page 13, insert "that the early sessions of our legislature understood." Strike out all of the last paragraph on page 14, and all of page 15, excepting the last paragraph.

The relator's petition for a rehearing herein heretofore submitted and by the court taken under advisement, is this day by the court denied.

51 STATE OF MONTANA.

In the Supreme Court, December Term, 1905.

No. 2258.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Relator,
vs.
JAMES H. RICE, as State Treasurer, Respondent.

Submitted December 9, 1905; Decided January 9, 1906.

Filed February 27, 1906. John T. Athey, Clerk.

Mr. Justice HOLLOWAY delivered the opinion of the Court:

The Ninth Legislative Assembly of Montana passed an Act entitled "An Act to enable the Normal School Land Grant to be further utilized in providing Additional Buildings and Equipment for the Montana State Normal College," approved February 2, 1905. This Act authorizes the state board of land commissioners to issue bonds, sell the same, and apply the proceeds to the erection, furnishing and equipment of an addition to the present state normal school building at Dillon. It is provided that the funds realized from the sale or leasing of the lands granted by the United
52 States to Montana for state normal school purposes (100,000 acres), and the licenses received from permits to cut timber on any of said lands, are pledged as security for the payment of the principal and interest on such bonds, except such sums as may be necessary to pay other bonds heretofore issued. There is the further provision that the State of Montana shall not be liable for the payment of the bonds or the interest.

Pursuant to the provisions of this Act the state board of land commissioners issued coupon bonds to the amount of $75,000, dated May 1, 1905, in denominations of $1,000 each, bearing interest at four per cent. per annum, payable semi-annually, and caused the same to be executed as prescribed by such Act. Thereafter such bonds were duly advertised for sale by the state treasurer, and the state board of land commissioners submitted a bid for said bonds at par as an investment for the permanent common school fund, which bid was accepted and, presumably, the money for the bonds paid over to the credit of the building fund of the normal school, although this does not appear affirmatively from the petition filed herein.

This relator, having performed services in connection with the erection of the addition to the State Normal School building, presented a claim for $1,200 to the executive board of the State Normal School, which was allowed and approved by that board, and allowed

and ordered to be paid by the state board of examiners, a warrant issued for the same by the state auditor, and this warrant presented by the relator to the state treasurer who refused to pay it. Thereupon this proceeding in *mandamus* was commenced to compel the state treasurer to pay said warrant. An alternative writ and
53 an order to show cause issued, and upon the return the state treasurer, represented by the attorney general, moved to quash the alternative writ and dismiss the proceedings upon the ground that the petition for the writ does not state facts sufficient to entitle the relator to any relief.

The contention of the respondent is, that the Act of the Legislative Assembly above referred to is unconstitutional, first, because the Act authorizes the expenditure of funds received from he sale of the Normal School lands for the payment of these bonds; second, because the issuance of said bonds increases the indebtedness against the state of Montana to an amount in excess of $100,000; and, third, because the Act authorizes the expenditure of the money for the erection of a building for the State Normal School.

By the provisions of Section 17 of the Act of Congress, approved February 22, 1889 (25 Stat. at Large, 676), commonly known as the Enabling Act, there was granted to the state of Montana "For State Normal Schools" 100,000 acres of the public land. Oher grants were made for the school of mines, the agricultural college, the state reform school, the deaf and dumb asylum, and the state capital buildings; and by other sections of the same Act a grant of 72 sections of the public land was made for a university, and grants, additional to those mentioned in section 17, for the state capital buildings and agricultural college.

Other like grants of land were made by the same Act to the States of North Dakota, South Dakota and Washington, and of the grants made by section 17 it is said: "And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, and in such manner as the legisla-
54 tures of the respective states may severally provide."

Section 5 of the Act of February 2, 1905, provides, that the state treasurer shall keep all moneys derived from the sale, leases, or sale of timber from lands granted in aid of the state normal school, in a separate fund to be known as "The State Normal School Fund," and out of this fund he shall pay the interest on these bonds as it accrues, and the principal at maturity.

Section 12 of Article XI of the Constitution of Montana provides: "The funds of the state university and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the state against loss or conversion. The interest of said invested funds, together with the rents from leased lands or properties shall be devoted to the maintenance and perpetuation of these respective institutions."

Beyond question the state normal school is one of the institutions of learning to which reference is here made, and as it is the only one with which we are directly concerned in this proceeding, we may paraphrase section 12 above, as follows: The funds of the state normal school, from whatever source secured shall be invested as prescribed by law, and the interest from such invested funds, together with the rent from leased lands belonging to the normal school grant, shall be devoted to the maintenance of such normal school.

The provisions of this section of the Constitution are mandatory and prohibitory. (Section 27, Article III.) *The funds* re-
55 ferred to mean *all* funds. They shall be invested *to draw interest* and used for no other purpose. The interest from such invested funds, and the rents from lands belonging to this grant which have not been sold—and not the principal sum derived from the sale of such lands or from the sale of timber—shall be used for the maintenance and perpetuation of the normal school, and for no other purpose.

If, then, the principal sum received from the sale of lands belonging to the normal school grant must be invested to draw interest, that principal sum can not be used to pay off the principal of or interest on the bonds authorized by the Act of February 2, 1905, as provided by such Act.

It is apparent from the most casual reading of section 12 of Article XI of the Constitution, and section 5 of the Act of February 2, 1905 above, that as soon as the treasurer receives any moneys from the sale of normal school lands or timber therefrom into "the State Normal School fund," such moneys shall be invested to draw interest, under such regulations as may be prescribed by law, and that only the interest on such invested funds, together with the rents from leased lands, can be devoted to the maintenance and perpetuation of the normal school. If this section of the Constitution is to be given force and effect, it is apparent that the Act in diverting the moneys received from the sale of normal school lands, or the sale of timber therefrom, to the payment of these bonds is in direct violation of the provisions of this section of the Constitution.

But on behalf of the relator it is contended that by the terms of section 17 of the Enabling Act, the lands granted to the state for normal school purposes are to be held, appropriated and disposed of for normal school purposes in such manner as the legislature
56 of Montana may provide, and that this Act is sufficiently broad to warrant the legislature in borrowing money and pledging such lands for the payment of the principal and interest. And it is further contended that, if section 12 of Article XI of the Constitution contravenes the provisions of section 17 of the Enabling Act, section 12 is invalid and of no force or effect. It is perfectly apparent, then, that in order to hold the act of the legislature approved February 2, 1905, binding and the bonds issued in pursuance thereof valid, this court must hold section 12 of Article XI of the Constitution inoperative and of no effect. However, as the Constitution of Montana is the supreme law of this state, aside from the provisions of the Constitution of the United States and the treaties made

and statutes enacted in pursuance thereof, it becomes incumbent upon this court to reconcile, if possible, the provisions of our Constitution with the Enabling Act under which the Constitution was adopted and the state admitted into the Union, for, however reluctant a court is to declare unconstitutional and invalid an Act of a legislative assembly, it will with even greater hesitation hold inoperative and invalid a provision of a state Constitution.

It is to be observed that the lands granted to the state by the Enabling Act are granted for specific purposes which are clearly defined: 100,000 acres are granted for state normal schools, and the only limitation upon the grant is, that such lands shall be held, appropriated and disposed of exclusively for the purposes mentioned, in such manner as the legislature may provide. Under section 17 above, the legislature might designate the agent to select and classify the lands. It might specify that the lands should be sold at
57 private sale or at public auction. It might specify the quantity of land to be sold at any one time, or the amount to be sold to any one individual. It might provide the terms upon which the land should be sold, and the price to be received for it. It might make suitable provision for renting the land, and fix the amount to be let to any one person and the price at which it should be let; and, finally, it might make provision for the sale of growing trees upon the lands selected under the terms of this grant. All of these provisions in section 17 were met by the legislative enactment comprised in Title VIII, Part III, of the Political Code.

The question now arises: Does section 12 of Article XI of the Constitution contravene the provisions of section 17 of the Enabling Act? Is there any conflict between the provisions of the Enabling Act, which grants to the state legislature authority to prescribe the manner in which these normal school lands shall be held, appropriated and disposed of,—and the provisions of section 12 of Article XI of the Constitution, which provides that the funds of the state normal school shall be invested and only the interest from the invested funds, together with the rent from leased lands, may be used for the maintenance and perpetuation of the state normal school? We are of the opinion that there is no conflict whatever. Under the provisions of section 17 of the Enabling Act the legislature has to do only with the *manner* of the management and disposition of the *lands* themselves, and can not control the funds derived from sales or leases except in conformity with the constitutional provisions of section 12 of Article XI above.

The lands were granted to the state of Montana,—not to
58 the Legislative Assembly. The legislature may say how the lands shall be held; but it is the state which holds them—which has title to them. It is the state which says what shall be done with the lands. The legislature may prescribe the manner of holding or disposing of them, but the title passes from the state, and the funds derived from sales or leases pass to the state, to be disposed of by the state as it may see fit, subject only to the condition that they shall be used exclusively for normal school purposes. The state may act through its constitutional convention, and, if it does so, such section

is conclusive. In the absence of constitutional provision, it may act through its legislative assembly. Therefore, when the constitution says that all moneys coming into the state normal school fund, from whatever source, shall be invested and only the interest and rental from leased lands shall be used for normal school purposes, the legislature may prescribe the manner in which the funds shall be loaned, but it can not say that they shall go into any other channed. The absence of any constitutional provision respecting the grant for capital building purposes, and the grant of the penitentiary at Deer Lodge city and the lands connected therewith, left the legislature free to make such disposition of these grants as it saw fit, so long as the original purpose of the respective grants was observed.

In the very highest sense the purpose of the grant in aid of the state normal school is observed and carried into effect by section 12 of Article XI of the Constitution. In the wisdom of the framers of that instrument, provision is made for the support of our state normal school for all time. The principal sums derived from the sales of the lands or of timber are made to serve this institu-
59 tion by earning interest which may be applied to its maintenance and perpetuation, while the principal sums themselves are kept inviolate.

A great deal of consideration was given by counsel to the question whether or not the language of section 11 of the Enabling Act modifies the language of section 17; and while we are of the opinion that it does not do so, under our view of the case it is not necessary to give further attention to this feature of the case.

Neither are we disposed to enter into a discussion now as to whether the bonds authorized by this Act increase the state debt.

So far as the other question is concerned it need only be noticed in passing. The United States granted 100,000 acres of land to Montana "for state normal schools." The congress was only concerned in seeing that this grant was applied to the purpose for which made. It was apparent that in order to be available, the lands must be utilized, and the congress therefore left it to the legislature of this state to designate the manner in which such lands should to be held, appropriated or disposed of; but it went no further than this. It did not attempt to say when the normal school should be instituted; how many normal schools should be established; or how the funds derived from the sale or leasing of these lands should be controlled or made to work out most effectually the end sought by the grant.

The constitutional convention adopted Ordinance No. 1, whereby the grant of these lands was accepted upon the terms and conditions provided in the Act; and as an extra precaution and as an additional safeguard, section 12 of Article XI of the Constitution was
60 adopted, making the grant in fact an endowment, and only the interest and rental immediately available for the use of the school and such interest and rental may be used for any legitimate purpose connected with the maintenance or perpetuation of the school.

But it is said that other like bond issues have been made against these various land grants, and that for a number of years the legislative and executive branches of this state government have given to

section 17 of the Enabling Act the construction for which contention is now made by this relator, and that such construction ought to be given great weight by this court. But, as we said before, such construction has the effect of nullifying a section of our state constitution, and this court ought to be slow indeed to declare such a result, no matter of the legislative and executive branches of the state government may have done so. Furthermore, the rule that contemporaneous construction by the department specially delegated to carry into effect a particular provision of law shall raise a strong presumption that such construction rightly interprets the provision, only becomes effective when there is a reasonable doubt as to the meaning of the provision. Such construction can never abrogate the text or fritter away its obvious sense. And acquiescence for no length of time in a construction by the coordinate branches of the government which has the effect of nullifying a provision of the Constitution, will justify a court in adopting such construction unless it is the only reasonable one. (Cooley on Constitutional Limitations, 7th ed., 104-106.) Furthermore, such construction to be available as an argument, must have been uniform, and such is not the fact with reference to the subject now under consideration.

61 The Enabling Act was passed February 22, 1889, and it is not contended that any attempt was ever made by the legislative or executive departments of the state government to give to section 17 the construction now claimed for it by relator, prior to March 6, 1895, when the first of these bond issues was authorized (Secs. 1630-1637, Political Code); so that the construction thereafter given by the legislature was not in fact contemporaneous with the passage of the Act. But, on the other hand, the constitutional convention met in July, 1889, and adopted section 17 of Article XI as the expression of its interpretation of section 17 of the Enabling Act, and the Second Legislative Assembly passed an Act entitled "An Act to Provide for the selection, location, appraisal, sale and leasing of state lands," approved March 6, 1891 (Laws of 1891, page 174*a*), by the terms of which it is specifically provided that all moneys derived from the sale of these lands shall be invested, and only the interest of such invested funds and rental from leased lands shall be used for the purpose for which the grant was made. These provisions were re-enacted in an Act of the Third Legislative Assembly, approved March 9, 1893 (Session Laws, 1893, page 49), and again re-enacted in a Code provision (Sec. 3509, Political Code), approved February 25, 1895.

Thus, within five months after the Enabling Act was passed, we have a construction of section 17 of it, by the constitutional convention, directly opposed to the view now urged by relator; and we further have apparently the same construction placed upon it, or at least an attempt to carry into effect the idea of the framers of the

62 Constitution, by every session of the legislature, barring the first, which did not accomplish anything in the way of legislation,—from the time of the passage of the Enabling Act to March 6, 1895; and it does not affect the result to say the various institutions had not been established prior to 1893.

It would seem that the early sessions of our legislature understood that the Congress meant that the state of Montana should in the first instance build the necessary buildings for a state normal school out of its own proper funds, and that this bounty should constitute an endowment for the maintenance and perpetuation of such school for all time to come thereafter; and that this was the construction given to section 17 of the Enabling Act by our Legislative Assembly is demonstrated by the action taken by it at the time these several state institutions were established. The Third Legislative Assembly provided for the establishment and location of the agricultural college, the university, the normal school and school of mines, and made an appropriation for each of these institutions. That for the state normal school is similar to the others, and provides for an appropriation of $15,000, and respecting this appropriation the Act says: "The money hereby appropriated, shall be expended under the direction of the state board of education, in the manner and under such restrictions as may be provided by law, and for the purpose of establishing said state normal school, by commencing the construction of suitable buildings for maintenance of said state normal school." It was clearly the understanding of the Legislative Assembly at that time that the state itself must erect the buildings, and it provided for the commencement of such work evidently with the idea that future legislatures would make other appropriations to complete the work then initiated.

63 So that the construction given to section 17 of the Enabling Act by the Montana legislature has not been uniform, even if the terms of that section were of doubtful meaning, which does not appear to be the fact.

We do not think that the construction given to that section since 1895 has been done under such circumstances, or that the result to be anticipated from a different construction now by the courts is of such character as to render applicable here the maxim *"Communis error facit just."*

While we do not agree with the reasoning of the supreme courts of Washington and North Dakota respecting the meaning of section 11 of the Enabling Act, it is interesting to note that they have held legislation of the character of the Act of February 2, 1905, invalid, and bond issues similar to that authorized by our legislature, void, and that, too, under the same Enabling Act and somewhat similar constitutional provisions. (State *ex rel.* Heuston *v.* Maynard, 31 Wash. 132, 71 Pac. 775; State *ex rel.* Board *v.* McMillan, (N. D.), 96 N. W. 310).

The Act of the legislature now under consideration is authorizing the expenditure of moneys received from the sale of normal school lands, or of the timber on lands granted in aid of the state normal school, for the payment of these bonds or the interest accruing thereon, is in direct violation of the provisions of section 12, Article XI, of the state Constitution, and is therefore void and of no effect; and, being so, the state treasurer rightly refused to proceed under it and can not be coerced by *mandamus.*

The alternative writ of mandamus is quashed and these proceedings are dismissed.

Dismissed.

64 WM. L. HOLLOWAY,
Associate Justice.

I concur:
THEO. BRANTLY,
Chief Justice.

Mr. Justice MILBURN: I concur in the opinion. I think it is well, however, inasmuch as a great deal is said in the opinion, and very properly, in regard to contemporaneous construction, that the statements made in the body of the bonds themselves in respect to the validity thereof, should appear. Section 3470 of the Political Code declares that the governor, the superintendent of public instruction, the secretary of state, and the attorney general shall constitute the state board of land commissioners. As appears from an inspection of the bonds, these officers signed each of said bonds. In each bond appears the following statement: "It is hereby recited and certified that this bond is issued in strict complicance with and conformity to * * * the constitution and laws of the state of Montana, and that all acts, conditions and things required and necessary to be done precedent to the issuance of this bond, and in the execution thereof, have been duly, properly, regularly and legally done, had and performed, and the full faith and diligence of the state board of land commissioners are hereby irrevocably pledged for the faithful collection and application of said funds for the payment of this bond and the interest thereon as herein and in said act provided." As shown in the opinion, the bonds are not in compliance with the Constitution. I think it proper that this construction of the law by the several executive officers of the state who signed the bonds,
65 given at the time of the issuance of the bonds, should appear as part of the history of the case.

That part of section 17 of the Enabling Act saying that "the lands granted * * * shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide," means, in my opinion, in a few words, this: that the legislature may say *how* the lands may be sold, but does not mean that they shall say what shall be done with the proceeds. The Constitution, in my opinion, is controlling in the matter, and is not in violation of any of the provisions of the Enabling Act.

GEO. R. MILBURN,
Associate Justice.

66 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Plaintiff in Error,

vs.

JAMES H. RICE, as State Treasurer, Defendant in Error.

Petition for Writ of Error.

To the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana:

The petition of Charles S. Haire respectfully shows that, on the 9th day of January, A. D. 1906, the Supreme Court of the State of Montana rendered a final judgment against your petitioner in a certain cause or proceeding, wherein the State of Montana *ex rel.* your petitioner was relator, and James H. Rice, as State Treasurer, was respondent, denying the application of your petitioner for a writ of mandate and dismissing the said proceeding or cause, and for costs, as will appear by reference to the record in said cause; and that said court is the highest court in said state in which a decision in said proceeding or cause could be had.

And your petitioner further represents that in said cause or proceeding, as appears from the record therein, the authority of the Legislative Assembly of the State of Montana to appropriate and apply the proceeds received from the leasing and sale of the
67 lands granted to the State of Montana for state normal schools by section 17 of the Act of Congress approved February 22, 1889, providing, among other things, for the admission of Montana into the Union, and known as the "Enabling Act," to the establishment of such schools, was drawn in question, and the said Supreme Court decided that such authority does not exist; that it was also contended by your petitioner, as appears from said record, that Section 12 of Article XI of the Constitution of the State of Montana is repugnant to the said Act of Congress, and furthermore violates the obligation of the contract resulting from the acceptance of the grant made by said Section 17 of said Act of Congress, and the decision of said Supreme Court in said cause was in favor of the validity of said constitutional provision; and that it was also claimed by your petitioner, as appears from the record in said proceeding or cause, that by virtue of the provisions of Section 17 of said Act of Congress, and the Act of the Legislative Assembly of the State of Montana approved February 2, 1905, entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the Montana state normal school," he is entitled to payment of the amount due him for services performed in connection with the erection of such buildings, as appears from the petition to said Supreme Court for a writ of mandate, constituting a part of the record in said proceeding or cause, out of the proceeds received from the sale of the bonds issued pursuant to said Act of the Legislative Assembly of the State of Montana,

and said claim was denied by the decision of said Supreme Court in said proceeding or cause.

And your petitioner further represents that the said Su-
68 preme Court, in holding and deciding as aforesaid, committed errors to the prejudice of your petitioner, which will more in detail appear from the assignment of errors filed with this petition.

Wherefore, your petitioner prays the allowance of a writ of error, returnable in the Supreme Court of the United States, and for citation; and your petitioner will ever pray, etc.

M. S. GUNN,
Attorney for Petitioner.

Let the writ of error issue as prayed.

THEODORE BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Plaintiff in Error,
vs.
JAMES H. RICE, as State Treasurer, Defendant in Error.

Bond.

Know all men by these presents: That we, Charles S. Haire, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto James H. Rice, as State Treasurer, in the sum of Five Hun-
69 dred Dollars ($500.00) to be paid to the said obligee, his successors, personal representatives or assigns, to which payment well and truly to be made the said principal binds himself, his heirs and personal representatives, and the said surety binds himself, its successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of March, 1906.

Whereas, the above named Charles S. Haire hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Montana:

Now, therefore, the condition of this obligation is such that, if the above named Charles S. Haire shall prosecute his said writ of error to effect, and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHARLES S. HAIRE, *Principal.*
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By FRANK BOGART, *Its Attorney in Fact.*

I hereby approve the foregoing bond and surety this 17th day of March, 1906.

THEODORE BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Endorsed: Filed March 17, 1906. John T. Athey, Clerk.

70 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA *ex Rel.* CHARLES S. HAIRE, Plaintiff in Error,

vs.

JAMES H. RICE, as State Treasurer, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error in the above entitled cause and says that the Supreme Court of the State of Montana erred in its decision and judgment in said cause, as appears from the record therein, and that the errors committed are as follows, to-wit:

I.

The said court erred in holding and deciding that the Act of Congress approved February 22, 1889, providing, among other things, for the admission of Montana into the Union, and known as the "Enabling Act," does not authorize the Legislative Assembly of the State of Montana to appropriate or apply the proceeds derived from the sale or leasing of the lands granted to said state by Section 17 of said Act for state normal schools, or from the sale of the timber thereon, to the establishment of such schools.

The court erred in holding that Section 12 of Article XI of the Constitution of the state, as construed by said court, is not
71 repugnant to Section 17 of said Act of Congress, and is valid.

III.

The court erred in holding and deciding that Section 12 of Article XI of the Constitution of the State of Montana, as construed by said court, does not impair the obligation of the contract resulting from the acceptance of the grant of lands made to the State of Montana by Section 17 of said Act of Congress.

IV.

The court erred in holding and deciding that the proceeds derived from the sale of said lands and the timber thereon constitute a permanent fund, no part of which can be used to establish a state normal school, or for any other purpose, except that of investment.

V.

The court erred in holding and deciding that the interest received from the investment of the proceeds of the sale of said lands

and the timber thereon, together with the rents derived from leasing said lands, can be used only for the purpose of maintaining and perpetuating a state normal school.

VI.

The court erred in holding and deciding that the Act of the Legislative Assembly of the State of Montana, entitled "An Act to enable the normal school land grant to be further utilized in providing additional buildings and equipment for the state normal school college," approved February 2, 1905, is invalid, as being in conflict with Section 12 of Article XI of the Constitution of the State of Montana.

72 VII.

The court erred in denying the application of plaintiff in error for a writ of mandate.

Wherefore, the said Charles S. Haire, plaintiff in error, prays that, for the errors aforesaid, and other errors appearing in the record of the said Supreme Court in said cause, to his prejudice, that the said judgment may be reversed.

M. S. GUNN,
Attorney for Plaintiff in Error.

Endorsed: Filed March 17th, 1906. John T. Athey, Clerk.

73 STATE OF MONTANA,
Office of the Clerk of the Supreme Court, ss:

I, John T. Athey, Clerk of the Supreme Court of the State of Montana, do hereby certify that the foregoing, from page 1 to page 72, inclusive, is a complete and true transcript of the record in the case of the State of Montana *ex rel.* Charles S. Haire *vs.* James H. Rice, as State Treasurer, as appears from the papers, records and proceedings in said cause on file in my office, including a copy of the original opinion of said court, filed on January 9, 1906, in said cause, which was corrected and changed as required by the order of said court, and which is no longer on file in my office, having been merged into the opinion of the court as corrected by the order of February 27, 1906; together with the assignment of errors filed in connection with the petition for a writ of error therein.

And I further certify that there is attached to said transcript the writ of error and citation issued in said cause, which, together with the said transcript and assignment of errors, are transmitted to the Supreme Court of the United States in obedience to the command of said writ of error.

Witness my hand and the seal of said court this 26th day of March, 1906.

[Seal Supreme Court State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court
of the State of Montana.

74 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana, before you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had, in the said action or suit between the State of Montana *ex rel.* Charles S. Haire, relator and plaintiff in error, and James H. Rice, as State Treasurer, respondent and defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission;

75 a manifest error hath happened to the great damage of the said Charles S. Haire, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 16th day of May, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of March, in the year of our Lord one thousand nine hundred and six.

[Seal United States Circuit Court, District of Montana.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States,
Ninth Circuit, in and for the District of Montana.

Allowed by:
THEODORE BRANTLY,
Chief Justice of the Supreme Court
of the State of Montana.

76 [Endorsed:] 2258. Writ of Error to the Honorable the Justices of the Supreme Court of the State of Montana. Filed March 17" 1906. John T. Athey, Clerk.

77 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To James H. Rice, as State Treasurer, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Montana, wherein the State of Montana *ex rel.* Charles S. Haire is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brantly, Chief Justice of the Supreme Court of the State of Montana, this 17th day of March in the year of our Lord one thousand nine hundred and six.

THEODORE BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attest:

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk of the Supreme Court of the State of Montana.

Service of the foregoing Citation admitted and receipt of a copy thereof acknowledged this 17" day of March, 1906.

ALBERT J. GALEN,
Attorney General of the State of Montana.

78 [Endorsed:] 2258. Citation To James H. Rice, as State Treasurer. Filed M'ch 19" 1906. John T. Athey, Clerk.

Endorsed on cover: File No. 20,195. Montana supreme court. Term No. 693. The State of Montana *ex rel.* Charles S. Haire, plaintiff in error, vs. James H. Rice, as State treasurer. Filed April 16th, 1906. File No. 20,195.